LAW DAYS;

OR

DIES JURIDICI,

COMMONLY CALLED

"TERMS OF COURT,"

THEIR APPLICATION TO COURTS IN GENERAL, AND PARTICULARLY TO THE MARINE COURT OF THE CITY OF NEW YORK.

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PREFACE.

I HAD occasion, a short time since, to prepare a Brief on the subject of Terms of Court, and concluded afterwards to publish the result of my examination in the form of an essay. I have not had time to give the subject a complete or exhaustive examination, and if what I have written proves of assistance to those disposed to investigate the subject more thoroughly, I will be more than gratified.

DAVID McADAM

New York, Sept. 1, 1874.

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CHAPTER I.

THEIR ANCIENT ORIGIN.

The Terms of Court, referred to in the English Reports and Books of Practice, represent certain portions of the year, in which the King's Justices hold plea in the *high Temporal Courts* belonging to their jurisdiction, in the places thereto assigned, according to the *ancient* rites and customs of the kingdom. When they were first instituted and by whom is in doubt, but that they existed before William the Conqueror is certain, and they have been continued under various constitutions, with certain modifications, ever since. Law days or *Dies Juridici*, which we call Terms, are as ancient as offences and controversies. (*Works of Sir Henry Spelman.*) The seasons devoted to determining controversies were designated *Terms*, and the exempted seasons were for devotion to God and the Church. (*Antiquities of Inns of Court*, 155.)

At the time of the conquest, and long after, there were three special periods at which the Kings held their Courts, or, as it was called, "Wore their Crowns" with extraordinary solemnity, not only for the consideration of National affairs, but also for the transaction of legal business. These were at Christmas, Easter, and Whitsuntide; answering to the present law terms of Hilary, Easter, and Trinity; Michaelmas Term having been added at a subsequent period. *Memories of Westminster Hall*, vol. 1, p. 2).

It is a curious illustration of the antiquity of the Terms that at the Court held at Christmas, 1096, a Judgment was pronounced against William, Earl of Eu, for a treasonable conspiracy, on the very day on which Hilary Term, according to the constitutions of Edward the Confessor, confirmed by William the Conqueror, began. (*Ib.*) In very early times, the whole year was considered as one continuous term for hearing and determining causes; and justice was administered upon all days alike, till at length the Church interposed and *exempted* certain holy seasons from being profaned by the tumult of forensic litigation; as, particularly the time of Advent and Christmas, which gave rise to Winter vacation; the time of Lent and Easter, which created that in the Spring; the time of Pentecost, which produced the third; and the long vacation, between midsummer and *Michaelmas*, which was allowed for the hay-time and harvest, (*Cooley's Blackstone*, vol. 2, marg. p. 276;) "and to reform abuse among Christians, in perverting the Lord's day to the hearing of clamorous litigants, it was ordained in 517, that no person should presume to try causes on the Lord's day." (*Works of Sir Henry Spelman.*)

Blackstone, speaking of the seasons exempted from Term Time, continues, "all *Sundays* also, and some particular festivals, as the day of the purification, ascension, and some others, were included in the same *prohibition;* which was established by a Canon of the Church, A. D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian Code, (*Cooley's Blackstone*, vol. 2, marg. p. 276,) so that terms were not only established, but an implied prohibition made against holding court at other than the stated terms, which were designated Hilary, Easter, Trinity, and Michaelmas. These canons and constitutions were all confirmed by William the Conqueror and Henry the Second; and became part of the Common Law of England (*Swann* vs. *Broome*, 3 *Burrows*, at page 1599).

The old English books of practice speak of the vacations between the Terms as the *prohibited* seasons, (*Burns' Attorney's Pr.* 40,) and, at *common* law, or at least without express enactment, neither the Judges constituting the whole Court, nor any Judge thereof, could do certain acts otherwise than during one of the four terms. (*Chitty's Gen. Pr.. Am. Ed.*, p. 102.)

The division of the year into Term and Vacation has been the joint work of the Church and necessity. The cultivation of the earth, and the collection of its fruits, necessarily required a time of leisure from all attendance on civil affairs; and the laws of the Church had, at various times, assigned certain seasons of the year to an observance of religious peace, during which all legal strife was interdicted. What remained of the year was allowed for the administration of Justice. (*Sellon's Pr.*, p. 2.)

The English Courts grew up with these *Terms;* they became part of their organic law, and were so regarded and continued by each succeeding constitution and Parliament since their institution: and so careful has Parliament been to preserve this *antiquarian* system of *Terms*, with their ancient names and associations, that, instead of creating new ones, to meet the increasing business of its Courts, it passed acts which, in effect, continued the old Terms by permitting things to be done in *vacation*, which were before inhibited; and various later acts have been passed tending to destroy the rule requiring writs to be tested and made returnable in Term time, the principal of which is that passed May 23, 1832. (*Chitty's Gen. Pr., Am. Ed.*, marg. p. 95.) The reason of the old rule requiring the return of process in Term, was that the parties *actually* appeared in Court, in term time on the return of the writ, in person or by attorney, and pleaded *ore tenus.* (*Bouvier's Inst.* vol. 3, p. 201. *Chitty's Gen. Pr.*, vol. 3, p. 89.) Where the pleadings were *ore tenus*, they were orally stated to the Courts whilst sitting in one of the terms; and although, at an early period, the practice of pleading

ore tenus was abandoned, and the pleadings were reduced to writing, still it was considered that unless a declaration were delivered *during a term*, no plea of a defendant could be required before the *next* term, but he was entitled to an *imparlance*. (*Chitty's Gen. Pr.*, vol. 3, p. 89.) The modern practice having dispensed with the *personal* appearance by a more convenient method of pleading and procedure, led to the doing away of that which had become needless and cumbersome. (*Bouvier's Inst.*, vol. 3, p. 201.) Notwithstanding these modifications and innovations upon the *ancient* system of Terms, Parliament still regulates and controls them, and the Courts have nothing to do with their formation or continuance. The sittings of the Courts *in banc* are of the character conducted exclusively in Term, but the sittings of the Courts of assize and *Nisi prius*, are held for the most part in vacation, that is, between the terms, (*Stephens' Com.*, vol. 3, p. 562,) and I have not been able to find any reported case in England holding that a trial at *Nisi prius*, in vacation, would be *coram non judice*. Whether these Terms operate as a *limitation of power* on the Courts, or merely impose a special duty upon the Judges to be present at the times designated to hear whatever business may lawfully be brought before them, will be considered hereafter.

Spelmann, in his *ancient* work on the Terms, (written in 1614), gives many interesting facts concerning them, several of which are referred to by Lord Mansfield in *Swann* vs. *Broome*, 3 Burrows' Reports, p. 1595.

CHAPTER II.

TERMS OF COURT IN NEW YORK, HOW THEY DIFFER FROM THE ENGLISH.

Terms of Court in New York, were established in 1801, by Statute, declaring "That the Supreme Court of Judicature of this State *shall* be held at the four several terms following, to wit: on the third Tuesdays of January, April, *July*, and October in every year; and that the said several terms of the said Court shall continue and be held, from the time of the commencement, every day, except Sunday, until and including Saturday in the next ensuing week, and that the term commencing on the third Tuesday of January, shall be called *January term*, and shall be held in the city of Albany; and the term commencing on the third Tuesday of April, shall be called *April term*, and shall be held in the city of New York; and the term commencing on the third Tuesday of July, shall be called *July term*, and shall be held in the said city of New York; and the term commencing on the third Tuesday of October, shall be called *October term*, and shall be held in the said city of Albany," (*Webster's Ed. Laws N. Y.*, vol. 1, p. 314, § 1;) and § 2 of the same act provides, "That there shall be in each of the said terms two common days of return only, that is to say, the first day and the Tuesday in the next ensuing week of each term, but that the process in proceedings by bill or otherwise, except on original writs, if issued in term, may be tested any day in the same term, or the next term;

and if issued in the vacation may be tested on any day in the preceding term, and be made returnable on any day in the next term." The act, § 10, authorizes the person administering the Government of the State, if he shall deem it expedient by reason of war, pestilence, or other public calamity, or danger thereof, during vacation, to appoint a different place for holding the ensuing term of the court.

The subsequent acts, up to the time of the adoption of the constitution of 1846, were substantially the same as the first. (See 2 *R. L.* 1813, p. 318; *Laws* 1823, chap. 182; 1st Ed. *R. S.*, vol. 2, p. 123, § 2; *Wyches' Pr.*, 10; *Caines' Pr.* 2; *Dunlap's Pr.*, vol. 1, p. 115; *Graham's Pr.*, 2nd Ed., p. 65; *Burrill's Pr.*, vol. 2, p. 459.) The Constitution of 1846 provides as follows: "The classification of the Justices of the Supreme Court, and the times and places of holding the terms of the Court of Appeals, and of the general and special terms of the Supreme Court within the several districts, and the Circuit Courts and Courts of Oyer and Terminer within the several counties, shall be provided by law." (Art. 6, § 9 of Const. 1846, N. Y.)

Under this constitutional provision the Legislature, in 1847, committed the designation of the Terms of the Supreme Court exclusively to the Judges of that court, with a direction that the terms, when designated, should be published in the State, and in a county newspaper, four weeks successively (*Laws* 1847, chap. 280, § 19); and the Supreme Court have ever since made these designations as, in the judgment of its justices, the public demands required. In 1848, the Code of Procedure was passed; and § 41 of that act, (§ 35 of the present code,) provides for terms in the Superior Court and Common Pleas, and commits the designation of them to the judges of those two courts respectively.

§§ 17 to 26 of the Code provide for general and special Terms of the Supreme Court, and the Circuit Courts and Courts of Oyer and Terminer.

Article 6 of the Constitution framed by delegates elected April 23, 1869, submitted *separately* to the People (under Laws 1869, chap. 318), and declared and adopted December 6, 1869, contains these provisions as to Terms:

"§ 7. At the first session of the Legislature, after the adoption of this article, and from time to time thereafter as may be necessary, but not oftener than once in five years, provision shall be made for organizing, in the Supreme Court, not more than four general terms thereof, each to be composed of a presiding justice, and not more than three other justices, who shall be designated, according to law, from the whole number of justices. Each presiding justice shall continue to act as such during his term of office. Provision shall be made by law for holding the general terms in each judicial district. Any Justice of the Supreme Court may hold special terms and Circuit Courts, and may preside in Courts of Oyer and Terminer, in any county."

And § 8 provides that

"No judge or justice shall sit, at a general term of any court, or in the Court of Appeals, in review of a decision made by him, or by any court of which he was, at the time, a sitting member."

And § 12 provides that

"The Legislature may provide for detailing judges of the Superior Court and Court of Common Pleas of New York, to hold circuits or special terms of the Supreme Court in that city, as the public interest may require."

Under these provisions the Legislature reorganized the *General* Terms of the Supreme Court into departments, and fixed the times and places for holding the same; and the Governor was authorized to detail Justices from the Superior Court and Common Pleas, according to § 12 just referred to. The statutes referred to relate exclusively to the Supreme and Superior Courts and Court of Common Pleas. (1870, chap. 408.)

The provision for the teste and return of process in term time, was done away with by the judiciary act of 1847, providing that thereafter process might be tested in Term or vacation, in the name of any Judge

of the court out of which it issued, and that every court of record should always be open for the issuing and return of process; and that no process subscribed with the name of the attorney, solicitor or party issuing it, (except such as were issued by special order of the court,) should be deemed void or voidable, by reason of having no seal, or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the Clerk of the Court out of which it issued. (*Laws* 1847, chap. 280, § 57.)

The Judiciary act also contains a provision for continuing terms of court as follows: "any circuit may be continued by adjournments to such time as the *Justice* holding such circuit, shall by a rule to be entered in its minutes, direct; and such adjourned circuit may be held and continued by further adjournment, *as often* as the Justice holding such court shall deem necessary, and causes may be noticed for trial and tried at such adjourned circuit, in like manner and with the same effect as at a stated circuit (*Laws* 1847, chap. 280, § 19); and by § 11 of the same act, a like provision is made respecting the general and special terms, and similar provisions are contained in the code. (§ 24.)

Terms of court, no doubt, aid the orderly administration of justice; they prevent surprise, by apprising suitors in advance when they may expect to be heard; but they were never intended to close the courts or deny justice to litigants asking to be heard; and the liberal provisions of the act just cited make the *Justice* holding the circuit the *exclusive* judge of the necessity or propriety of its continuance; and, by a rule to be entered in its minutes, this power may be exercised *as often* as he deems necessary; and the only notice litigants have of this determination, is the entry of the rule in the minutes of the court; and this power has received legislative approval for upwards of twenty-seven years, a circumstance which, of itself, shows that it was satisfactorily placed; and the Legislature even went further and authorized *either* of the Justices of the

Supreme Court, during *vacation*, to try all issues that might be tried in the Circuit Court for the City and County of New York, and exercise all the powers of such court—and that such sittings might be had on such days as the Court should by order appoint for the purpose, and be continued for as many days as the *Judge holding the same* might *think* necessary. (2 *R. S.*, 204, §§ 206, 207; *Graham's Pr.*, 2nd Ed., p. 282.) In this connection a word might be said in reference to the similarity of duties between our former *Circuit* Judges and the Nisi Prius Judges of England. Graham, in the second edition of his Practice (page 25), speaking of *Circuit Judges*, says, "Under the old constitution this court consisted of five judges, who travelled the circuits for the trial of causes at *Nisi Prius*, after the manner of the Court of King's Bench in England. The new constitution divided these powers by reducing the number of these judges, and distributing the State into circuits, for each of which it directed a Circuit Judge to be appointed in the same manner, to hold his office by the same tenure, and to have the like powers as the Justices of the Supreme Court at Chambers; and, in the *trial* of *issues*, joined in the Supreme Court and in Courts of Oyer and Terminer, and jail delivery; and, pursuant to this power, the Legislature created eight circuits, corresponding in number and extent with the eight Senate districts, and the power of the Circuit Judges extended to all parts of the State."

He afterwards explains how issues were sent down to the circuit for trial, and the proceedings thereafter.

These circuits had Terms, which were designated by the Circuit Judge, and sent to the County Clerk of the Circuit where the court was held, and to the State printer for publication, and these circuits were continued as long as the Circuit Judge considered necessary; and causes could be noticed for any adjourned circuit, and tried thereat, in like manner as at a stated circuit (*Graham's Pr.*, 2nd Ed., p. 282), and the Su-

preme Court Justices had concurrent powers. (*Ib.*) I am aware that, in the case of *Northrup* vs. *The People*, 37 N. Y., 203, the provisions of the Code regulating the Terms of the court of the Oyer and Terminer received a judicial construction, so far, at least, as to deny that the Justice assigned to hold it had the right to adjourn to a place other than that named in the designation made by all the Justices of the Supreme Court, under sections 17 and 25 of the Code, and it is a circumstance suggested by the authorities that the legality of Terms of court have been questioned chiefly by convicted prisoners in their efforts to cheat justice, or by dishonest debtors in their struggle for delay. So much the more, therefore, should these avenues of escape be guarded.

Note.—The Northrop case is fully noticed in Chapter VI.

CHAPTER III.

THE COURTS THAT OBSERVE THE TERMS.—THE APPLICATION OF TERMS TO THE MARINE COURT.

In England, the High Court of Parliament, the Chancery and inferior Courts do not observe the Terms; only the Courts of King's Bench, the Common Pleas, and Exchequer, *the highest Courts of Common Law* (*Tomlin's Law Dic., Title Terms, Sellon's Pr.*, 2); and it is even said that the Exchequer may sit out of Term (*Sellon's Pr.*, 2). These Terms of court certainly had no application to the Marine Court prior to the Act of 1872; for although it was declared to be a court of record (2 *R. L.* 1813, p. 379, §§ 106, 107), yet the attributes of a court of record were entirely wanting in its powers and forms of proceeding; these being all inferior, and founded entirely upon statutory enactments, and such only as are bestowed on District Courts and Courts of Justices of the Peace, neither of which are courts of record (*Graham on Jurisdiction*, p. 57); and the authorities uniformly held it to be of *special* and *limited* jurisdiction (*Ford* vs. *Babcock*, 1 *Denio*, 158; *Huff* vs. *Knapp*, 1 *Seld.*, 65; 2 *Hall*, 471; 23 *Wend.*, 375; 6 *Hill*, 590; 29 *How.*, 292); and the statutes regulating it required the court to be *always open*, and the only authorized *vacations* were Sundays and certain general holidays (2 *R. L.* 1813, p. 383, § 108; *Laws* 1849, chap. 144, § 8); and, although Terms were assigned, as matter of conve-

nience for the orderly transaction of the business of the court, the Judges themselves lost none of their judicial power, nor did the assignments made interfere with the statutory direction that the court should be *always open.*

THE ACT OF 1849

makes it the *duty* of each of the Justices of said court to perform his equal share of the duties of the office; so that at ten o'clock in the morning of each day (except Sundays, the usual holidays, and other days upon which the inhabitants of the city may refrain from business) the Justices *shall* be in attendance, and *shall* remain until the calendar for the day of causes set down for trial shall be disposed of, or such time as may be reasonable; and one Justice till four o'clock in the afternoon; and further provides that "No Justice, while at the rooms of the Court, nor actually engaged in the discharge of other duties of his office, shall refuse to consider and act upon any application for his official action, which may be properly made to him" (*Laws* 1849, chap. 144, § 8); and the only *vacations* recognized by the Acts of 1813 (2 *R. L.*, p. 382), § 108) or 1849 (chap. 144, § 8) are Sundays, the Fourth of July, the Twenty-fifth of November, the Twenty-fifth of December, and the First of January (1813, p. 383, § 108), and the usual general holidays (1849, chap. 144, § 8), and the day of any general or special election (1 *R. S.*, 5th Ed., p. 418, § 4; 7 *Hill*, 194).

These statutes were not expressly repealed, and that they were not repealed by implication is demonstrated by numerous adjudicated cases.

THE ACT OF 1872

declares the Marine Court to be "a court of record to and for all intents and purposes," and yet it takes nothing by implication; its jurisdiction is still statut-

ory, or, in the language of the decisions under the prior acts, "*special* and *limited*," and it has not yet risen to the dignity of "*one of the highest courts of common law*"—so that the Terms of court, in their full and technical meaning, would have no application to it in the absence of legislative action; and the same section, declaring it a court of record, provides that it *shall continue to be vested with the same jurisdiction now conferred upon it by law*, except as *otherwise* prescribed, declared and enlarged by this act." (1872, chap. 629, § 1.) This act took away none of the powers belonging to the court or its Justices; on the contrary, these powers were continued. Part of this power, was to administer the law at all times (*except on the holidays already enumerated*); and this power, although enlarged, was not *otherwise* prescribed or declared, and only *inconsistent* laws were repealed. Keeping in mind the Act of 1849, requiring the court to be *always open*, we now pass to the question, whether the Act of 1872, providing for Terms, took away this power. A question precisely similar arose in the Supreme Court, and was determined in the Court of Appeals, which puts at rest any doubt that might be raised. The case arose after the Judiciary Act of 1847 (chap. 280), and after the Code, and both of these acts were judicially construed. The question came up in this way: an application was made to the Supreme Court for the custody of a child. The mother made the application (the father being dead), and the grandfather, having possession of the child, opposed the application on the ground that he had been legally appointed by the Surrogate guardian of the child's person and estate. The application was made by petition, on which Justice MASON, of the Supreme Court, made an order requiring the grandfather to show cause, at his chambers in Hamilton, Madison County, why the prayer of the petitioner should not be granted.

The grandfather appeared before Justice MASON,

pursuant to the order. Among other objections urged, he insisted that the Justice had not power or jurisdiction to hear and decide the matter at chambers; and that if the relief prayed for could be granted on petition or motion, *the application should be made at a regularly apponted Term of the Court.*

Judge MASON overruled the objection, and directed the grandfather to deliver the child to the mother. The order was entered, and on appeal, it was affirmed by the General Term, and on appeal to the Court of Appeals, it was again affirmed, Judge Mitchell delivering the opinion of the court, in which Judges A. S. Johnson, S. L. Selden, George S. Comstock, and S. W. Hubbard concurred; in which opinion the Court of Appeals, after stating the facts, dispose of the questions of law in reference to the power of Justice Mason, at other than a stated term of his court, as follows: "It is especially important that the court should *always be open* to hear such matters, and accordingly this was one of the matters which were heard by the Chancellor at chambers, even in contested cases. The same power, with the same right to exercise it at all times, has devolved on the Supreme Court, and may be exercised by the Justices acting as a court at their chambers, as well as at the stated Special Terms. The constitution is express that the Supreme Court shall have general jurisdiction in law and equity (*Art.* 6, § 3). Part of this 'jurisdiction' of the Court of Equity *was to exercise its powers at all times, although it also had stated terms;* and thus the constitution devolved upon the Supreme Court, until it should be altered pursuant to the power vested in the legislature to alter and regulate the jurisdiction and proceedings in law and equity (*Const., Art.* 6, § 5). It needed no further legislation to vest this power in the Supreme Court; it was transferred there by the constitution, and continues there until it is taken away by some express and clear provision of law. So far from doing this, the legislature has confirmed it. The

judiciary act of 1847 declares that the Supreme Court and its Justices shall possess the same powers and exercise the same jurisdiction as was then possessed by the Supreme Court and Court of Chancery (*Laws* 1847, *page* 323, § 16). Certainly there was no intention in this law to abridge any of the powers exercised before by the Chancellor; or to prevent the Justices of the present Supreme Court from exercising any powers which the Chancellor before exercised, and in the manner and at the times in which he exercised them. Unrestricted as his jurisdiction was as to time and place, so it was to continue and to pass to the present Supreme Court and its justices. Not one, it is believed, ever doubted that this was the true construction of the law so long as the court acted under the judiciary act alone; and it can not be doubted that this construction was acted on in innumerable instances. Has the Code, then, made any alteration in this respect? It has not repealed this part of the judiciary act; that still remains in force, and is a recognition of the powers which are daily exercised by the court. The code does not profess to limit the powers of the court, nor to define all the cases in which it may act, any more than it professes to furnish a complete guide for the courts in all cases of practice or pleading which may occur. It lays down certain rules of practice and pleading, and so far as those rules extend it is absolute; but in cases left unprovided for by the Code, the courts are left to their former practice as their guide. *So it also provides for certain Special and General Terms of the court* (*Code*, §§ 15, 17); but this does not interfere with the powers of the court to act in equity matters at other times and places. *A like provision was made, under the old system, for stated or special terms of the Court of Chancery* (2 *R. S.* 176, §§ 48, 51, 53, 58,) *yet its power to be always open* remained in force. This was part of its jurisdiction, or, as the term implies, of its power '*to declare the law*,' which was expressly preserved

by the judiciary act. *The special terms are prescribed, not to prevent the former practice of the court in equity cases of being ever open for them, but to impose a special duty on the Judges then to be present at a certain place to hear everything that might be lawfully brought before them*, without the necessity of previous application to the Judge, as is necessary when he hears the case at chambers. The order must therefore be affirmed. (*Wilcox* v. *Wilcox*, 14 *N. Y.*, 578.)"

Comment is unnecessary, and any *unbiased* lawyer will see at a glance the *analogy* between the two cases.

The principle decided is not new, but its application is conclusive.

Repeal by implication has never been favored, and the rule is settled that the earlier statute remains in force, unless the later act is *manifestly* repugnant to it, or unless the later act takes some notice of the former, *plainly* indicating an intention to abrogate it. (Brown *vs.* Lease, 5 *Hill*, 221; Williams *vs.* Potter, 2 *Barb.* 316; People *vs.* Deming, 1 *Hilt.* 271; Mayor *vs.* Walker, 4 *E. D. Smith*, 258.)

Referring again to the Court of Chancery, and keeping in mind the decision of the Court of Appeals first cited, attention is called to rule 86, of that court, published under the supervision of Chancellor KENT in 1818, as follows: "Rule 86. That the stated terms of this court shall hereafter be held on the second Monday in June, and last Monday of September, at the city of New York; and on the third Monday of January, and second Monday of November, at the City of Albany." Yet neither these terms nor the terms provided by the code prevented the Court of Chancery nor the Supreme Court, in equity matters, from being open at all times.

THE TERMS OF COURT DESIGNATED UNDER THE ACT OF 1872, AND PARTICULARLY WITH REFERENCE TO JULY AND AUGUST, 1874.

Assuming for the moment that the prior *organic* statutes of the court were repealed by the act of 1872, (a conclusion hardly possible), the power to hold court for trials in July and August may be considered in another aspect; the assignments made by the whole court for 1874, authorized the trial of actions during every month of that year, and especial attention is called to the peculiar phraseology of the act to a proper and intelligible construction of its provisions. It provides "The court shall appoint general and trial terms; and, *also*, *special terms thereof for hearing and deciding* issues of law, motions *and other proceedings*," and further provides that "*judgments* upon appeal shall be given at the general term, "*and all other judgments* at the trial *or the special term*," so that although the trial and special terms were separate and distinct branches of the court, the Justice at the special term as well as the Justice at trial term were each authorized to hear and determine controversies at their respective terms, and to render judgments thereat. (*Laws* 1872, chap. 629, § 4,) and this provision is in harmony with the prior acts.

The Justice assigned under this act to hold the "special term" in July, 1874, was Justice McAdam.

The Justice assigned in like manner for August, 1874, was Justice Shea, and by reason of his continued *absence* during that term, Justice McAdam took his place, (*Laws* 1872, chap. 629 § 4;) so that under these assignments Justice McAdam became the regularly assigned Justice of the "special term" for July and August, 1874, with authority to determine controversies and render judgments thereat. *(Ib.)*

In recognition of this right, all the Justices of the court after the act of 1872 passed the following rule, which is still in force: "*Rule* 6. During the months

of July and August, there shall not be any regular jury called, but *the Justice holding court* will order special panels *in his discretion*." Justice McAdam, being thus assigned for July and August, became and was the "court" during those two months. (Tracy *vs.* Tallmadge, 1 *Abb. Pr.* 460.) No official notice is required to be given by the act of 1872 on calling a term into existence; there is no filing of papers and no publication required; and in these respects the act of 1872, in reference to the Marine Court, differs essentially from the provisions of the code regulating terms in the higher courts of record. Yet to avoid surprise, and to inform litigants when they might be heard, the following order was officially made and entered by the clerk, and *published* in all the daily papers, commencing in June, 1874, and continuing up to the end of the August Term.

"MARINE COURT IN JULY AND AUGUST, 1874.

"For July and August, 1874, the following regulations will be observed:

"Chambers will be open every day from 10 A. M. to 4 P. M. for ex-parte business.

"Litigated motions will be heard between the same hours every day, excepting Tuesdays and Fridays. On these two days (Tuesdays and Fridays), Jury Trials will be had in Part I, commencing at 10 A. M. and ending when the last case on the Day Calendar is finished.

"By order of the Court, MAURICE J. POWER,

"Clerk."

During July and August there were *seventeen* trial days; and more *satisfactory* terms, to court, litigants, and counsel were never held, owing no doubt to the fact that litigants having honest controversies anxiously await their day in court, and complain only of the law's delays, and not of its speed. *Chitty* says that "*all proceedings* in a cause, excepting those that must of necessity be decided upon in *banc*, or in the Practice

Court, may be taken or had in and during the *vacation;* and the expedients of *sham pleading, or other devices, to get over the term*, as was the technical expression, have been defeated" (*Chitty's Gen'l Pr.* vol. 3, p. 102).

The class clamorous for delay, and who resort to "*sham pleading and other devices*" to obtain it, should meet with no more encouragement in the Marine Court, than they do in the higher courts of England, referred to by *Chitty*, notwithstanding the adage that,

> "No rogue ere felt the halter draw
> With good opinion of the law."

In construing this act of 1872, in regard to Terms, the distinction between "Special Term" and Chambers, long recognized in courts of record, is to be observed, (*Bank of Genesee* v. *Spencer*, 15 *Abb. Pr.* 14.) and the assignments for July and August, 1874, were for the "Special Term," and the powers of the Justice at *Special* Term, under the act of 1872, are as comprehensive as the Justice at trial term. Either may try cases and render judgments, and one or more of these terms may be held at the same time (1872, chap. 629, § 4).

The Propriety of Jury Trials in July and August.

The Marine Court was created for the prosecution of small demands, and with a view to speedy justice; and notwithstanding the enlarged powers conferred upon it from time to time, its original jurisdiction is still limited to $1,000, that is the *maximum*, and as most of the demands litigated are what are termed "collection suits," against persons of dubious pecuniary responsibility, a speedy trial becomes necessary in order to insure satisfaction after judgment.

The Marine Court, recognizing this fact, kept open *every* day during July and August, up till about seven

years ago, when it changed its daily sessions, during those months, to trials on Tuesdays and Fridays.

This practice continued until the adoption of rule 6, already referred to, making it discretionary with the Justice presiding in July and August, to order special panels and try causes, if he thought proper to do so. Under this discretionary order, jury trials on *Tuesdays* and *Fridays* were *revived*, so that their revival was merely the continuance of a system inaugurated in 1813, and continued without interruption ever since with the single exception already noticed.

Deprive the Marine Court of the power to try actions in July and August, and what is to become of the numerous mariner's claims for wages on the voyage, or for cruel treatment while upon the high seas? These were especially committed by the legislature to the care and protection of the "Marine Court." Its name is derived from this peculiar jurisdiction. Delay to them is a denial of justice.

The *exception* contained in the Act of 1872, in favor of marine cases (chap. 629, § 5), relates merely to the *conduct* of the proceedings, and does not reserve to or confer upon the Justices any judicial power other than that possessed in other cases.

Defendants in actual custody unable to procure bail, in seamen's cases or ordinary actions for torts committed, and in which the cause of action furnishes the ground of arrest, *clamor* for a speedy trial. The effect of delay is well explained by Judge Fancher in his speech before the Chamber of Commerce, on the recent opening of the Court of Arbitration. After showing how the law's delays in other countries had driven much of the litigation into courts of arbitration, he said, "Liberty is nothing else than justice. If we would secure the blessings of our political inheritence, we must guard against the evil of the *law's delays*. Wrongs should not be suffered to overturn the steps of timely redress."

Other Courts in July and August.

The Supreme Court of this State formerly held sessions for jury trials in July, (*Webster's R. L.*, vol. 1, p. 314, § 1,) and at a later period in August. (*Dunlap's Pr.*, vol. 1, p. 114; *Caines' Pr.*, p. 2; see also *Laws* 1848, chap. 380, §§ 11, 12, 1 *Paine and Duer Pr.*, 172.)

The Common Pleas held jury trials in July, up to and including the year 1852. August was the only vacation. (*See Rules adopted June*, 1848, *printed in Voorhies' Code of* 1851, *and also the court minutes.*)

The Superior Court also held jury trials in July, and General Term in August. (*Paine and Duer's Pr.*, vol. 1, p. 224.)

In *England*, during the terms, the Chancellor sat in Westminister Hall, but during the vacation he *heard* causes in Lincoln's Inn Hall and other places, and often at his own house, of which instances are mentioned in the times of Sir Thomas More and Lord Chancellor Audley. (*Memories of Westminster Hall*, vol. 1, p. 9.)

CROWDED CALENDARS.

It is not an uncommon thing for a court with a crowded calendar to hold evening sessions as late as ten o'clock. It is the practice of every circuit or trial term outside of the county of New York, in civil as well as criminal cases, and the sessions of the Marine Court very seldom extended as late. In this city, the Real case, the Stokes case, the Sullivan case, and many other criminal trials, were extended late into the night. No one found fault, and the public approved of it; and yet human life when on trial is certainly as sacred and entitled to even more consideration and deliberation than petty controversies, in a court whose jurisdiction is limited by statute to an amount that can not exceed, in its most important and trying deliberations, one thousand dollars. Clearing the daily calendar, even if sessions are extended a little into the

evening, is certainly more desirable to litigants, than dancing attendance for days, to accomplish the same result, for in the language of the lamented HORACE GREELY, in his Recollections of a Busy Life (p. 264), "It is not possible for a business man to spend his whole life in court-rooms, waiting for his case to be called."

These sessions, if long and tedious, must necessarily be more wearisome to the judge, whose attendance is constant, than to litigants and counsel whose attendance is only limited and occasional. The trial of patience on the casual attendant is slight compared with the constant strain upon the judge. This power of continuing sessions into the evening must of necessity be confided to the discretion of the Justice presiding, to be exercised as in his judgment the public interests and the rights of litigants require. The Justice being a *salaried* officer, can have no other motive or inducement to *extra* hard work, than a conscientious discharge of public duty; and considering that nature makes the same demands for rest upon him that it makes upon his fellow man, and the fact that he can not keep others without remaining and sharing the same deprivations and inconveniences himself, would seem to be almost a sufficient assurance that the discretion cannot be much abused, and it is a recorded fact that after the act of 1853, (chap. 617,) increasing the jurisdiction of the Marine Court from $250 to $500, its business increased so fast that the judges were "*frequently obliged to sit to a late hour in the evening.*" (*Livingston's Law Reg. for* 1854, p. 378.)

The necessity that induced this practice twenty years ago would undoubtedly justify its revival now.

Our Police Courts open *every* morning, during the year, (*even on Sundays,*) between 6 and 7 o'clock, and complainants, witnesses, and counsel are required to appear at these inconvenient hours, on all days alike. The *necessities* of their business require this practice,

and the Justices, who are *salaried* officers, are obliged to conform to it.

Our Civil District Courts hold *daily* sessions, with a jurisdiction of $250, and one-half of the cases commenced in the Marine Court, are for less than that amount, yet the public necessities demand these sessions, and the Judge of *any court*, who seeks public approval by his *indolence*, will find that judicial office, cannot be made an asylum for its encouragement, and that justice will demand of him, either a fair share of public duty, or a retirement into private life, where he may indulge his peculiar habits, in his own way, without seriously affecting the public good.

Lord ~~Chancellor~~ Denman, of England, held circuit in Summer vacation from 9 A. M. till 8 1-2 P. M. with approval.

In the *Summer* assizes of 1834, Lord ~~Chancellor~~ Denman, while presiding on the Western Circuit, wrote two letters, from which extracts are here given. In one to his sister, Mrs. Baillie, he says: "The circuit has been entirely satisfactory. *Very hard work came*, indeed, more than once in *very hot* weather, and I was almost used up at Exeter; but I rallied, and am now remarkably well." And in the other, to Lady Denman, he says: "I have tried *four long cases* to day, and have still *eight* to try, how long or short I can not guess. I am eagerly waiting for the opportunity to take wing, and may, perhaps, fly faster than this letter to its destination."

"To-day, *after sitting in court till half-past eight*, I dined with the Sheriffs—a great Tory party. My health was splendidly received, and I proposed that of Sir Charles Wetherell, the Recorder. The utmost humor prevailed.

"When I began this it was past midnight, and, as I must be in court *by* 9 *to-morrow*, I will now wish your Ladyship good-night." (*Lives of the Chief Justices of England*, vol. 6, pp. 14, 16.)

Similar instances in this country as well as in England might be mentioned; the books contain many of them, and in no case without approbation.

We are told that following precedent and good example is safe as well as commendable, particularly in judicial office; and that the Justices of the Marine Court of the City of New York, although neither of them "Lord Chancellors" in fact, name, judicial learning, or dignity of office, may with propriety follow some of their approved habits of industry, is a proposition no honest man of ordinary judgment will for a moment dispute.

THE JUDICIAL COURTESY TO BE OBSERVED AMONG ASSOCIATES is well illustrated by language employed in one of the opinions in Ramsey *v.* Gould, in 4 *Lansing*, at page 481, in reference to cases where disappointed suitors seek relief from one judge, that has already been denied by another, and if not out of place here, reference to it may not be improper.

In condemning the practice, the Court says: "It is unwise, because it is greatly calculated to impair the dignity of a judicial tribunal, when one judge affords relief to a suitor who has dared to impugn another judge of the same court. The *dignified*, the right course, would be to refer such an application to the judge whose authority was thus contemned, and not, by entertaining a motion for relief, *seem to give countenance to such practice.*

"*To entertain such motions, is to sit in judgment on the rectitude of an associate, and to establish a practice that may some day be used against those who assert or approve such a rule.*

"*It will be sad indeed for the honor, dignity, and usefulness of courts, when judges give color to baseless assaults upon each other by granting favors to those who make them, instead of promptly and effectually rebuking them.*"

Nothing need be said as to the application or propriety of the rule in that particular case. It is enough

to say that the *rule* itself is correctly laid down, for *general* application, and wherever applicable, will certainly meet approval.

CHAPTER IV.

HOW THE TERMS OF COURT AFFECTED THE JURISDICTION OF THE ENGLISH SESSIONS.

In the case of the *King* vs. *The Justices of Leicester*, the question arose. whether the Statute 54 Geo. III., c. 84, was imperative. It was contended, on one side, that before the 54 Geo. III., for regulating the time for holding the Michaelmas Quarter Sessions was passed, all the Quarter Sessions were holden under certain *ancient* statutes which were deemed merely directory ; and that Quarter Sessions holden at other times than those specified in the statutes were always considered good ; that the Statute 54 Geo. III. merely changed the time for holding the Michaelmas Quarter Sessions from the week after Michaelmas to the week after the 11th of October; and that it should therefore receive a construction similar to that which had been put upon the earlier statutes made in *pari materia*, viz: that it is directory only, and not imperative. It is further claimed, that, admitting the former acts to have been directory, this statute seemed to take away the discretionary power of the Justices; for it appoints a new time instead of that formerly fixed. That this must, (if any language can), be considered imperative. In giving judgment, LORD TENTERDEN, Chief Justice, said, "Looking at the earlier statutes upon this subject, we find that by the 12 Rich. II., c. 10, the Justices were required to keep their sessions in every quarter of the year at least, but no particular days are specified.

By the 2 Hen. V., § 1, c. 4, they shall make their sessions four times in the year: Michaelmas, Epiphany, Easter, and the Translation of St. Thomas the Martyr; and oftener if need be. The modern statute merely substitutes the week after Michaelmas, etc. So long ago as the time of Lord Hale, the earlier statutes were considered directory. 'It is very plain,' Lord Hale says, 'that the Quarter Sessions are variously held in several counties, *yet those are each of them good Quarter Sessions; for these acts*, especially that of 2 Hen. V., are only directive and in the affirmative.'" "It has been asked," proceeds Lord Tenterden, "what language will make a statute imperative, if the 54 Geo. III. c. 84, be not so? Negative words would have given it that effect, but those used are in the affirmative only." (*The King* vs. *The Justices of Leicester*, 7 B. & C., p. 6.; *Potter's Dwarris' Statutes*, p. 227.)

CHAPTER V.

TERMS OF COURT IN OTHER STATES.

The effect of the Terms upon the various courts in other States depends entirely upon the circumstances under which their courts were called into existence. If the State constitution or statute *creating* the court, imposed upon it stated Terms, they might be considered as limitations upon their jurisdiction, for courts so *created* should clothe their proceedings with all the solemnities prescribed by the act which gives them judicial life, or it might be held that acts done in any other manner, or at any other time, were not a proper exercise of the power conferred; and it has been held that such courts can only be held during the stated terms.

Notwithstanding the strict rule adopted in 20 Alabama N. S., 446; 2 Scammon, 227; 20 Arkansas, 77; 24 Arkansas, 479; 42 Alabama, 404; under their peculiar judicial organization, as to the effect of a judgment rendered out of them, Chief Justice Wallace, of California, in the matter of Bennett, at July term, 1872, held:

"The principal objection made for the petitioner, as we understand it, is that the cause here was tried in chambers, and not in open court—and it is said that there is no authority to try a cause except in open court.

"But even if this be so, we do not see that it would follow that a judgment rendered in a cause which had

been tried in chambers, would, for that reason, necessarily be void, in the absolute sense.

"The district court unquestionably had jurisdiction of the subject matter and of the parties litigant. Had the court itself rendered the judgment in question in open session at a regular term, without trial, without proof, and even without submission of the cause for decision, such judgment, however erroneous, would not be held void upon a mere collateral attack. To maintain that would be to ignore the obvious distinction between a total want of authority upon the one hand, and the erroneous exercise of conceded authority upon the other."

And, speaking of the power to enter judgment in vacation, the judge, in the same opinion, says: "It is a power, too, which is no more dependent upon 'or affected by' the fact of trial had, or trial not had, than if the judgment had been entered in term time by the court. The hearing of proofs, the argument of counsel, in other words, the trial had—or the absence of any or all these, neither confer jurisdiction in the first instance, nor take it away after it has once fully attached." (*Ex parte Bennett*, 44 *California Rep.*, p. 87, and see a much stronger case reported in the 48th of *New York Reports*, pp. 41, 45, 55.)

CHAPTER VI.

THE MONEGHAN CASE, 1 PARK. CRIM. R. 570. THE NORTHRUP CASE, 37 N. Y., 203; AND CASES IN 2 COW., 445; 24CAL., 17; 39 ILL., 554.

We now propose to consider these two cases, taking the Moneghan case first, which was decided by our Supreme Court, at the Monroe General Term, in 1854, and presented the question whether the Court of Sessions of Livingston County, at which Moneghan was convicted, was legally called into existence. The prisoner interposed a special plea to the jurisdiction of the court, claiming it was not legally constituted, and stating the facts on which he depended for such conclusion; the counsel for the people demurred, and the Court of Sessions overruled the demurrer and awarded Judgment of conviction, and the record was brought before the Supreme Court on certiorari. The question involved was one of construction. The Judiciary Act, art. 5, § 42, enacted that "Courts of Sessions, except in the city and county of New York, shall be held at the time and place at which county courts for the trial of issues of fact by a jury of the same county shall be held, and the same number of grand and petit jurors shall be drawn and summoned therefor, and attend the same as is now required for courts of general sessions of the peace, in the same county;" and in 1851, the legislature passed an act in

these words; "Courts of sessions, except in the city and county of New York, shall be held in the respective counties at such times as the county judge of the county shall by order designate, and the county judge shall in such order designate at which terms of the sessions a grand or petit jury, or both, or neither, shall be required to attend; and no grand jury or petit jury shall be required to be drawn or summoned to attend any terms of the courts of sessions which shall be designated by the county judge to be held without such jury; *such order shall be published in a newspaper* printed in such county, for four successive weeks previous to the time of holding the first term of said court under such order." The county judge made an order requiring jurors to attend the county court, but no reference was made to the sessions. The order was admitted and set out in the return. The Supreme Court, speaking of this order, says, "No court is named or alluded to in the language employed, besides the county court; it is the terms specified of that court a grand jury is required to attend, and there is nothing ambiguous in the order;" and hold that it was not a valid designation of the times for holding a court of sessions under the act of 1851, and the conviction was held to be irregular.

The case last cited was in some respects peculiar. There was no Judge of the Sessions, *eo nomine* in Livingston County, and the County Judge acted, as such, *ex officio*, although the two courts were recognized as distinct in organization and jurisdiction, and to preserve their identity one from the other, the County Judge was required by order to designate the time of holding the Sessions and the Terms at which Grand and Petit Jurors should be required to attend, and the act is mandatory that the "Courts of Sessions, except in the City and County of New York, *shall* be held at the time so designated," in the order which the County Judge is required to make, and for public information, publish in a newspaper printed in the

county, for four successive weeks, prior to the term designated.

This order was never complied with, and the court never legally called into existence, the mandatory direction in the statute could not be disregarded, the County Judge could not, *harlequin* like, transform himself from a County Judge to a Justice of the Sessions, at pleasure and without notice, for the statute not only directed a notice, but required it to be published a given number of weeks before the change could be effected according to law. (1 *Park Crim. R.*, 570.) As to the legality of adjournments in these courts, (see 2 *Cow.*, 445 ; 24 *Cal.*, 17, and 39 *Ill.*, 554.)

Next in order comes the case of the People *v.* Northrup, 37 *N. Y.*, 203, in which the prisoner was indicted in Westchester County, for a felony in September, 1866. In December following, a Court of Oyer and Terminer commenced at the Court House in *White Plains* in said county, and it was ordered, and proclamation made, that the same be adjourned to the 14th day of January, 1867, at the Court House in *Bedford*, in that County. At the adjourned day, at *Bedford*, only ten petit jurors answered, and the court directed that seventy-five talesmen be summoned by the Sheriff, for the following morning, till which time the court adjourned. These talesmen were accordingly summoned from the town of Bedford, and of them, some sat upon the trial of the indictment. Before the jury were called, certain objections were made by the counsel for the prisoner to the legality of the court as thus sitting, and to the jury as thus constituted. The District Attorney moved on the trial, and prisoner's counsel having *shown* that in the appointment by the Justices of the Second Judicial District of Terms for the holding of courts, no appointment for the holding of any Court of Oyer and Terminer, to be held at *Bedford*, for the County of Westchester, had been made for either of the years 1866 or 1867, it was therefore contended that the

court then and *there* sitting had no rightful power or authority to proceed with the trial. This objection was overruled and exception taken. Another objection was, that only ten petit jurors of those summoned having appeared, "the Court then ordered the clerk to prepare ballots of the jurors in said town of *Bedford*, and ordered the Sheriff to proceed and draw seventy-five jurors from the box containing the names of said jurors in said town of Bedford (instead of the county at large) to act as talesmen. This objection was also overruled. There was no question raised in the case as to the power of the court to adjourn to another *time*, but its right to adjourn to a *place* other than that fixed in the original appointments agreed upon by all the Judges, was the point directly made, and the Court said, "The power to fix the times and places of holding courts was committed by statute to all the Judges, and not to a single Judge of a judicial district. In virtue of this power, *White Plains* was the only place appointed for holding the Courts of Oyer and Terminer for the year 1867, in the County of Westchester." The Court further held that the places at which courts are held derive an additional importance from the terms of the statute relating to trials by jury, and the Court then discussed the prisoner's objections to the talesmen summoned from Bedford, and decideed that, on account of the unauthorized adjournment to *Bedford*, the conviction was illegal and must be reversed. This case presented the question, whether a court could be migratory, and the Court of Appeals held that when its place of meeting was once fixed by all the Judges it could not be changed, except by the same authority by which it was designated. This was undoubtedly proper; and it is stated in the "Memories of Westminster Hall," vol. 1, page 3, that King John, when in England, was in the habit of making frequent progresses through the kingdom, and of holding his court in a multiplicity of places, to the great inconvenience and expense of the suitors, who were obliged

to follow him in order that their causes might be tried; and that, by a clause in Magna Charta, dated June 15, 1215, this intolerable grievance was abated; and the decision in the Northrup case effected the same object in this State, and scarcely anything more. (*On this Power of Adjournment.* see also *Price* vs. *Peters*, 15 Abb. Pr., 197; *Litchfield Bank* vs. *Church*, 9 Conn. 146.)

CHAPTER VII.

WHAT PROVISIONS OF LAW ARE REGARDED AS DIRECTORY MERELY, AND NOT AS A LIMITATION OF POWER.

Various Illustrations.

In 1831, an action calling in question the legality of a court martial, was decided in our Supreme Court by Hon. Wm. L. Marcy, prior to his election as United States Senator. The action was against the Sheriff of Ontario County, to recover back moneys paid to the defendant's deputy as fines imposed by the court martial. It appeared that the court martial was appointed by a brigade order, issued in July, 1818. The militia law, under which the order was issued, made it the duty of the commanding officer of the brigade to appoint a brigade court martial, on or before the first day of *June*, in each year, and the order approving the court martial, in this case, was issued in July, a month after the time specified in the act, and the plaintiff's counsel claimed it was on that account *void*. The plaintiff recovered a verdict, which was *set aside*, and the court (Marcy, Justice) after stating the facts, held, "The general rule is, that where the statute specifies the time within which a public officer is to perform an official act, regarding the rights and duties of others, it will be considered as *directory* merely, unless the nature of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of

the officer. The act regulating sales of real property on an execution, makes it the duty of Sheriffs to file a certificate of sale in the clerk's office, in ten days after the sales takes place; yet this omission does not affect the validity of the sale;" and after giving another illustration and citation, the court proceeds: "So it may be said of this case, that as there is nothing in the nature of the power, showing that it might not be as effectually exercised after the first of June as before, and as the act giving it contains no prohibition to exercise it after that period, the naming that day was a mere direction to the officer in relation to the manner of executing his duty. There is nothing in the nature of the power given, or in the manner of giving it, that justifies the inference that the time was mentioned as a limitation. (The People *vs.* Allen, 6 *Wend.*, 486.) This is a very strong case, considering that the statute creating the office contained this direction as to the "Term" or time for calling the court martial into existence; for it has been held that where a power or franchise has been created by statute which fixes or prescribes the mode of its exercise, the power must be exercised in the mode pointed out in the act and in no other, and those upon whom it is conferred are confined strictly to the act creating it, (Head *vs.* Providence Ins. Co., 2 *Cranch*, 127. Ed. of 1806.) for in such cases the act is the enabling statute; it creates all the power that is possessed, and all who act under it must clothe their proceedings with all the solemnities which the act demands.

"When a statute directs a person to do a thing in a certain time, without any negative words restraining him from doing it afterwards, the naming of the time will be considered as directory to him, *and not a limitation of his authority*, (*see the various cases collated in Dwarris' on Statutes*, p. 223,) and a statute requiring the court to limit the time of the sentence of a convict, so that his imprisonment in the State prison should expire between May and

November, is merely directory; and a failure to comply with such requirement does not render the sentence void, (Miller *vs.* Finkle, 1 *Park. Cr.*, p. 374,) and for further illustrations of this rule see Steuart *vs.* Slater, 6 *Duer*, 84, *Ex parte* Heath, 3 *Hill*, 42; *Wood* v. *Chapin*, 13 *N. Y.* 509; 18 *N. Y.* 200,) and where the superior courts have a jurisdiction, it can only be taken from them by the express words of an act of Parliament, or by necessary implication, (*per Ashurst, J.*, 4 *T. R.* at 116,) and the general principle, that statutory provisions may in certain cases be treated as purely directory, has been recognized in all the States. In regard to capital trials for murder, in Michigan, a statute requiring a circuit judge to assign a day for the trial, has been held clearly directory, so far as time was concerned. (*The People* v. *Doe*, 1 *Michigan*, 452, 453.) Where a city charter required that a certain number of jurors should be chosen on the first Monday of July, and they were not chosen till the first of August, it was said that the provision was directory, and the jury was held to be legal, (*Coll* v. *Eves*, 12 *Conn.* 243,) and even the constitutional provision (*Const., art.* 3, § 15) in regard to all laws "that the question upon the final passage shall be taken immediately upon the last reading, and the yeas and nays entered on the Journal," was held to be directory merely, (*The People* v. *Supervisors of Chenango*, 4 *Seld.* 317,) and a similar decision was made as to the Common Council. (*Striker* v. *Kelly*, 7 *Hill*, 9; and see also 14 *Barb.* 259; 4 *Seld*, 88, 89, 93.)

These various citations certainly favor the idea that as to time, the provisions for Terms are merely directory, and do not take away from the court the power it exercised before, of declaring the law, whenever the public necessities require.

CHAPTER VIII.

OBJECTION THAT JUDGMENT WAS RENDERED OUT OF TERM, HOW AVAILABLE.

In all the cases cited, where convictions were reversed on appeal, the *objection* as to the legality of the Term was distinctly made upon the trial, and was either sustained by proof or admissions printed in the case forming part of the record. And this is the appropriate mode of testing the question, for, as was observed by the Supreme Court General Term, in The People *vs.* The Central City Bank, 53 *Barb.*, at p. 415, referring to two orders made by Judge PECKHAM. It is said they are invalid, because not shown to have been made at a regularly adjourned special term, and not to have been actually entered by the clerk. *As to this objection, I think the answer is, that it will not be presumed that they were made at a term irregularly held.* There is nothing to show that the special term in question was not the continuance of a term regularly held by the Justice, and held open by him for the transaction of further business, at his chambers or elsewhere. The court having been regularly convened, continues open till actually adjourned. An order for its continuance is not essential; and an order made by the court, that it should so continue, is not necessary to be entered with the clerk. If it is so, I think when actually made by the court, (which is the act which gives it validity,) it is the duty of the clerk to enter it; or, if accidentally omitted, it may be entered

by him *nunc pro tunc*, and would, even now, if necessary, be ordered to be entered, to sustain proceedings had under it, otherwise regular." And in another case, it was held that it will be presumed by law that the court was held where it first met, until the contrary is shown, (Smith *vs.* State, 9 *Humph.*, 10,) and in another case where the record failed to show what adjournments were made after opening the court, on appeal it was held that the presumption was in favor of their regularity. (State *vs.* Martin, 2 *Iredell Law*, 122.)

In Bedell *vs.* Powell, 3 *Code Rep.*, 61, it was held that an order granted at the *circuit* purporting to be an order of a *special* term, was a nullity, and on appeal it was vacated. The assignments of Terms were at this time made and promulgated by the *Governor*, and the absence of a special term, at the time and place indicated, was apparent on mere inspection of the order.

And it is doubtful whether parties regularly brought into a court having jurisdiction of the subject matter, so that complete jurisdiction once attaches to them, can *after* judgment try the question of the legality of Terms, or any other question of regularity in the subsequent proceedings before judgment, in any other form than by appeal, and the case upon appeal should present the error complained of in an intelligable form, which can scarcely be done in the absence of a specific objection, with proof or admission of the facts, on the trial for, *every presumption is in favor of the regularity of the proceedings, and the legality of the Term, and this presumption must be negatived in some positive form.* (Fisher *v.* Hepburn, 48 *N. Y.* at pp. 53, 57.)

In an action commenced in one of the District Courts, the defendant, *after* judgment, and after proceedings supplementary to execution had been commenced in the Court of Common Pleas, moved in that court, that the plaintiff be perpetually stayed from proceedings on his judgment, one of the grounds being

that the adjournment of the action by the justice from the court-room to his office, and a trial thereat, deprived him of jurisdiction, and rendered the judgment void; and the Common Pleas General Term, on an appeal from an order made therein, held that the defendant's *remedy* was by appeal, and that the court would not in any collateral way, inquire into or pass upon the legal effect of the trial at the justice's office, but intimated that on appeal it was error for which the judgment might be reversed; and the application for a perpetual stay was therefore denied, and the defendant ordered to proceed with the examination under supplementary proceedings. (Price *v.* Peters, 15 *Abb.* 197.)

A similar question came up in the Commission of Appeals in a case where objection was made for the first time upon appeal, that the case was tried in the Supreme Court by Judge BARNARD, out of term. Judge INGRAHAM, at special term, on motion, set the judgment aside, and on appeal the general term affirmed the order. It was reversed, however, by the Commission of Appeals, and Judge BARNARD'S judgment was sustained. In the opinion of the court, in which all the Judges concurred, it is said:

"It would be a very unwise administration of justice, and lead to much vexatious litigation, if a judge holding one special term could, upon mere motion, set aside the decision and judgment of another judge at special term.

"It is also objected, that it appears, by the caption to the findings of Mr. Justice BARNARD, and of the judgment, that the action was not tried at any term of the court, but before the judge, out of court, at his chambers. The objection was not made in the moving papers, and seems to have been raised for the first time in this court.

The order to show cause, and the order setting aside the judgment, both assume and state in substance, that the action was tried in court. If any objection

had been made in the moving papers, it could have been made to appear more clearly, perhaps, that the action was tried in court, and hence the objection should not be permitted to be raised here for the first time. *But it is sufficient that it appears that the action was tried at a special term*, held at the City Hall, the place for holding courts in the City of New York. The chambers of the judge may have been in the court room, and while it is recited, that it was a special term for motions and chamber business, *we can not assume that there was not a regular court sitting there for the hearing of all special term business*, in the face of the fact that the parties without objection went to trial. It may be that this particular place for holding the court was provided by the sheriff, under sections 24 and 28 of the Code, and the special term may have been adjourned to the Judge's Chambers, under section 24. *Every presumption must be in favor of the proceeding in this respect.* (Fisher *vs.* Hepburn, 48 *N. Y.*, at pp. 53, 55.)

The right of an appellate tribunal to reverse, even in cases of want of jurisdiction in the court below, was reiterated and established in McMahon *vs.* Rauhr, 47 *N. Y.*, 67.